IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10/11/2004

CORAM

THE HONOURABLE MRS. JUSTICE R. BANUMATHI

S.A.NO.107 OF 1994

1. Murugesa Naicker (died)
2. M. Krishnaraj
3. M. Selvaraj
4. Banumathi ... 1st Defendant/Appellants
/ Appellants.
(Appellants 2 to 4 are
brought on record as
L.Rs. of deceased sole
appellant as per order
dt.3012.2002 made in
C.M.P.Nos.12941 to 12943
of 2002)

-Vs-

1. Govindaraja Nattar
2. Jayalakshmi Ammal ... Plaintiffs/Respondents
/Respondents.

This Second Appeal arises out of the Judgment and Decree dated 15.0 9.1993 made in A.S.No.167 of 1992 on the file of Sub Court, Cuddalore in confirming the Judgment and Decree dated 11.03.1992 made in O.S. No.202 of 1989 on the file of District Munsif, Cuddalore.

!For Appellants :: Mr. V.Raghavachari

^For Respondents :: Mr.K.Kannan

: JUDGMENT

First Defendant is the Appellant. Aggrieved over the Judgment and Decree of the Sub Court, Cuddalore in A.S.No.167 of 1992 Dated: 15.09 .1993, D.1 has preferred this second appeal. Under the impugned Judgment, the First Appellate Court has confirmed the Judgment of District Munsif Court, Cuddalore in O.S.No.202 of 1989 (Dated: 11.03.1992) granting Decree for Specific Performance in favour of the Plaintiffs and directed the first Defendant to execute the sale deed.

2. The suit property relates to House Site in T.S.No.1616 of

Cuddalore Sudarsanam Street. Case of plaintiffs is that D.1 has entered into an agreement of sale on 14.04.1980 for Rs.10,700/-. The suit property was the subject matter of litigation in the earlier suit and proceedings in S.A.No.1175 of 1966. Possession was about to be taken through the process of Court. Sale consideration of Rs.3,000/- paid as advance under the earlier agreement of sale dated 03.10.1971 was adjusted towards the sale consideration under the suit agreement. Further, on the date of agreement of sale, plaintiffs have paid a sum of Rs.1,000/- to D.1 besides another sum of Rs.700/- received by D.1 already; in all total sum of Rs.4,700/- was received by D.1 treated as advance for the sale consideration. Balance of Rs.6,000/- alone remained to be paid. Under the agreement, D.1 has agreed to execute the sale deed within one month from the date of taking delivery of possession through Court. D.1 received further sum of Rs.2,001/- on various dates in the year 1983. D.1 in collusion with D.2 to D.4 seems to have taken delivery of the property outside the Court in the Second Week of February, 1989. Plaintiffs are always ready and willing to pay the balance of sale consideration and obtain the conveyance from the Defendants. According to plaintiffs, a sum of Rs.3,999/- alone is payable. Further the plaintiffs have expressed their willingness to pay the entire amount of balance sale consideration of Rs.6,000/- if the Court finds that the sum of Rs.2,001/- ca nnot be deducted from out of the sale consideration. Since the first defendant has not executed the sale deed and performed his part of the contract, plaintiffs have filed the suit for Specific Performance.

3. Denying the plaint averments, D.1 has filed the written statement denying the validity and genuineness of the suit agreement dated 14.04.1980. D.1 has already entered into an agreement of conveyance with second plaintiff under Written Agreement dated 03.10.1971. Since the second plaintiff was not ready and willing to perform her part of the contract and have the sale deed executed, as per the terms of that sale agreement, the agreement of sale dated 03.10.1971 stands cancelled. The suit agreement is brought into existence in the name of the plaintiffs as they are powerful and influential. The said agreement is a sham and nominal document and as such invalid and unenforceable.

4. Denying the plaint averments, defendants 2 and 3 have also filed separate Written Statements. Second defendant has claimed title to the suit property through a registered Settlement Deed dated 06.09.1 971 and denied 1st defendant's right to execute the sale deed. According to defendant 2 and 3, the Settlement Deed is true and valid, accepted and acted upon and that defendants 2 and 3 are in possession and enjoyment of the suit property claiming title under Pachaiammal.

5. On the above pleadings, the trial Court framed five issues. On issue Nos.1 and 2, the trial Court found that Ex.A.1 - Agreement of Sale is true and genuine. Case of plaintiffs that a sum of Rs.2,001/- was paid to D.1 under Exs.A.2 to A.5 - Receipts, was not accepted by the trial Court on the ground that there are no recitals in Exs.A.2 to A.5 that they relate to Ex.A.1 - Suit Agreement of Sale. The trial Court held that the Plaintiffs are to pay Rs.6,000/- to D.1. The trial Court rejected the defence version denying the genuineness of Ex.A.1 and directed D.1 to execute the Sale

Deed in favour of the Plaintiffs.

6. Confirming the Judgment of the trial Court, the First Appellate Court also rejected the defence set forth by Appellant / D.1 that Ex.A.1 is not a true and genuine one. Contention of the defendants that Ex.A.1 is a sham and nominal document was rejected. Referring to S.20 of Specific Relief Act, the First Appellate Court found that the inadequacy of consideration is no ground for declining the relief of Specific Performance.

7. Aggrieved over the concurrent findings of the Courts below, Appellant / D.1 has preferred this Second Appeal. The Second Appeal has been admitted on the following Substantial Question of Law:-

" Whether the Courts below were right in decreeing the suit for Specific Performance in spite of the Plaintiffs' failure to establish that they were always ready and willing to perform in full their part of the contract ? "

8. Learned counsel for the Appellant / D.1 has forcibly contended that the trial Court ought to have framed the prime issue on the Readiness and Willingness of the Plaintiffs and the failure to frame that issue vitiates the Judgments of the Courts below. Contending that there had been no pleading and proof on the issue of Readiness and Willingness by the Plaintiffs, the trial Court without framing the prime issue has not properly appreciated the evidence. It is further submitted that in the First Appellate Court also on the question of Readiness and Willingness, no point was framed which vitiates the concurrent findings of the Courts below. Drawing the attention of the Court to Exs.A.2 to A.5, it is submitted that when the case of the Plaintiffs on payment of Rs.2,001/- under Exs.A.2 to A.5 had been disbelieved, the trial Court ought not to have granted the decree for Specific Performance exercising the discretion. In support of his contention, the learned counsel for the Appellant / D.1 has relied upon (2002) 8 Supreme Court Cases 146, A.I.R. 1971 ANDHRA PRADESH 279, 2003 - 3 - L.W. 479 and A.I.R.1983 Madras 169.

9. Reiterating the concurrent findings of the Courts below, learned counsel for the Respondents / Plaintiffs has drawn the attention of the Court to the averments made in Para (7) of the Plaint wherein specific averments are made as to the Readiness and Willingness of the Plaintiffs. It is submitted that before the Courts below when the genuineness of Ex.A.1 was mainly attacked, the question of Readiness and Willingness has not been made a contentious issue at all. From the evidence adduced, the Readiness and Willingness of the Plaintiffs is well proved. Submitting that the Plaintiffs have not made a false plea, the learned counsel has contended that though Exs.A.2 to A.5 would prove the payment of Rs.2,001/-, they were not accepted by the Courts below mainly on the ground that there are no recitals relating to Ex.A.1 and such finding would not in any way disentitle the Plaintiffs for getting the Sale deed executed.

10. This Court has carefully considered the submissions of the first defendant and the plaintiffs. For better appreciation of the

contentious points raised, it is necessary to refer to the background of the suit agreement.

11. Plaintiffs 1 and 2 are the Husband and Wife. The suit property relates to House Site in T.S.No.1616, Sudarsanam Street, Cuddalore. The suit property originally belonged to one Pachaiammal under a Compromise Decree in S.A.No.1175 of 1966 on the file of High Court, Madras. The said second appeal arose out of the suit filed by Pachaiammal in O.S.No.523 of 1962 on the file of D.M.C., Cuddalore. D.1 purchased the property from the said Pachaimmal under a Registered Sale Deed dated 02.01.1967. The property purchased by D.1 was the subject matter of litigation. D.1 was constrained to take steps to obtain delivery of property through Court which was time and again obstructed by Veerappa Asari and D.4 - Nataraja Asari. Faced with those litigations, D.1 could not cope up with the Court expenses; he entered into an Agreement of Sale - Ex.A.7 (dated: 03.10.1971) with the second Plaintiff for a sale consideration of Rs.6,000/-. Sum of Rs.3,000/- was received as advance on the same day and the balance was agreed to be paid on or before 02.11.1974. The second plaintiff was always ready and willing to purchase the property. She has issued a Legal Notice on 19.10.1974 offering to pay the balance sale consideration and take the sale deed. D.1 has taken time since the possession of the property was not delivered to D.1. Again, second plaintiff issued Notice on 08.12.1979 calling upon D.1 to execute the Sale Deed. D.1 belatedly replied on 17.03.1980 denying his liability to perform his part of the contract.

12. In the above factual background, D.1 has entered into Ex.A.1 - Agreement of Sale with the second Plaintiff on 14.04.1980 for a sale consideration of Rs.10,700/-. Ex.A.1 clearly refers to the earlier Agreement of Sale under Ex.A.7 and that it is subsisting. Ex.A.1 clearly expresses the intention of the parties that the sale could not be completed since D.1 could not take delivery of possession. The parties have also expressed their intention that the fresh agreement is entered into since the property is yet to be taken delivery of. The relevant recitals in Ex.A.1 - Agreement of Sale reads thus:-

(Vernacular portion deleted)

Thus the consideration of Rs.10,700/- has been set off / paid or agreed to be paid as:-

The amount set off as against the ()
Sale Consideration as per the ()
earlier agreement - Ex.A.7 () Rs. 3,000.00

Amount already received by D.1 () Rs. 700.00

Amount paid on the date of ()
agreement of sale () Rs. 1,000.00

D.1 agreed to execute the sale deed within one month from the date from which D.1 takes delivery of possession. Thus Ex.A.1 - Suit Agreement of Sale

emanates from the earlier Agreement of Sale - Ex.A.7.

13. Throughout the trial and before the First Appellate Court, D.1 has adopted a consistent stand denying the genuineness of Ex.A.1 as is clear from the following averments in the Written Statement of D.1 :-

" ... But the alleged agreement of conveyance dated 14.04.1980 is neither true nor valid nor supported by consideration nor enforceable under law ... "

" ... Thus the said agreement dated 14.04.1980 is a sham and nominal document and as such invalid and unenforceable and the plaintiffs have merely obliged this document to bring into existence such a document ... "

In view of such categoric denial of Ex.A.1, the trial Court framed the main contentious Issue Numbers 1 and 2 on the validity of Ex.A.1 as:-

(Vernacular portion deleted)

14. Ex.A.6 is the Delivery Receipt in E.P.No.1004 of 1981 in O.S. No.523 of 1962 on the file of D.M.C., Cuddalore evidencing that possession has been handed over to D.1 through the process of Court on 01.0 3.1991. The present suit has been filed on 03.03.1989. On the date of filing of the suit, D.1 had not taken delivery of possession of suit property. Hence D.1 has also raised another plea that the suit has been filed in the premature stage. In the light of that defence plea, Issue No.3 was framed, whether the suit had been filed in the premature stage ? Thus D.1 was mainly assailing the genuineness of Ex. A.1 and that the suit has been filed in the premature stage. That Readiness and Willingness has neither been raised nor made a contentious issue. On such pleadings and proof set forth by the parties, no issue came to be framed on the question of Readiness and Willingness of the Plaintiffs to perform their part of the contract under Ex.A.1 - Agreement of Sale.

15. Though D.1 has not raised the plea of Readiness and Willingness of the Plaintiffs, duty has been cast upon the Court to raise the issue of Readiness and Willingness. Onbehalf of Appellant / D.1, it is mainly contended that non-framing of that issue vitiates the findings of the Courts below. Clause (c) of S. 16 provides that the person, seeking Specific Performance of the contract, must file a suit wherein he must aver and prove that he has performed or has been ready and willing to perform the essential terms of the contract which are to be performed by him. Even if there is lack of pleading on this point, it is the duty of the Court to satisfy itself on the twin mandatory requirements of pleading and proof. It is contended that there is no proper pleading and proof and the failure of the Court to frame the specific issue on the Readiness and Willingness of the Plaintiffs vitiates the findings of the Courts below. Attacking the case of the Plaintiffs that the Plaintiffs were never ready and willing to perform their part of the contract, it is contended that after Ex.A.1 - Agreement of Sale (14.04.1980), there was no response from the Plaintiffs. Pointing out that there had been no issuance of notice between 19 80 and 1989 and that there is not even one pre-suit notice, learned counsel for Appellant / D.1 has submitted that in the

absence of pleading and proof on the Readiness and Willingness by the Plaintiffs, the Courts below erred in exercising the discretion to grant the relief,of Specific Performance.

15. The above contention raised by D.1 does not merit acceptance. As noted earlier, in the light of denial of Ex.A.1 and the defence plea set forth that the suit has been filed in the premature stage, no issue of Readiness and Willingness was framed. In fact, D.1 has not raised this point even before the First Appellate Court. No doubt even if no defence had been raised on the point of Readiness and Willingness, the Court is called upon to determine the point. From the pleadings and the evidence adduced, this Court finds that it is not as if there is a complete lack of pleading. The following averments in Para (7) of the Plaint express the Readiness and Willingness of the Plaintiffs in performing their part of contract:-

" ... The Plaintiffs are always ready and willing to pay the balance of sale consideration and obtain the conveyance from the defendants ... "

16. Readiness and Willingness of the Plaintiffs is further evident by payments under Exs.A.2 to A.5. The concurrent findings of the Courts below are to the effect that the payments under Exs.A.2 to A.5 are not towards the suit Agreement of Sale, since there are no recitals connecting Ex.A.1 - Agreement of Sale. But the fact remains that the amount under Exs.A.2 to A.5 have been paid to D.1 for meeting the litigation expenses. In his evidence, the first Plaintiff / P.W.1 has also stated that the amount under Exs.A.2 to A.5 have been paid to D.1 only towards the suit agreement. Since the case was under litigation, expecting the conclusion of the delivery proceedings, the Plaintiffs might not have taken steps on Ex.A.1 either by issuing legal Notice or by filing a suit. But P.W.1 has clearly explained his Readiness and Willingness as noted below:-

(Vernacular portion deleted)

17. Further, during Cross-examination, no questions were put to first Plaintiff on the ground of Readiness and Willingness. Most part of the Cross-examination has been directed only towards denial of Ex.A.1 and in trying to establish that the suit property is a joint family property and that the Sons of D.1 are also entitled to a share in the suit property, which is clear from the following:-

(Vernacular portion deleted)

Raja, Son of D.4 has also filed a suit in O.S.No.208 of 1989 on the file of Sub Court, Cuddalore and obtained interim order restraining D.1 from taking possession. Thus during the Cross-examination of P.W.1 , Readiness and Willingness of the Plaintiffs has not at all been made a contentious point.

18. It is not as if there is complete absence of pleading and proof of Readiness and Willingness. In the factual scenario of the case as to how Ex.A.1 was entered into between the parties is to be pointed out. As noted earlier, the averments regarding Readiness and Willingness in Para (7)

of the plaint and the evidence of Plaintiffs are sufficient compliance of S.16(c) Specific Relief Act. When there was no specific defence on the question of Readiness and Willingness, non-framing of the issue on the Readiness and Willingness does not vitiate the concurrent findings and the decision of the Courts below.

19. Insisting that it was incumbent upon the Plaintiffs to aver and prove that all along they were ready and willing to take the sale deed, learned counsel for the Appellant / D.1 has relied upon 2003 - 3 - L.W. 479 - Govindappa Naidu v. C.Sidda Chetty & others. In the said case, it was evident on record that the plaintiff has not established his requisite financial capacity to pay the sale consideration within the time stipulated and that the plaintiff has approached the Court only after the sale deed was executed in favour of seventh defendant by D.2 and that plaintiff has been keeping quiet for a long time. In such circumstances, the Division Bench of the Court held that there is absolutely no evidence to show that plaintiff was ready and willing to perform the contract.

20. In the next decision reported in A.I.R.1983 Madras 169 - H.G. Krishna Reddy & Co. v. M.M.Thimmiah relied onbehalf of Appellant / D.1, the suit was filed long time after the stipulated time for the performance of the contract and the Plaintiff has not gone into the Witness Box. In that view of the matter, the Division Bench has held that the plaintiff has failed to establish his Readiness and Willingness to get the sale deed executed. Absolutely there is no comparison on facts between those cases and the case in hand. In continuation of Ex.A.7, Ex.A.1 - Suit Agreement of Sale was entered into between the second Plaintiff and D.1. Delivery proceedings were filed in E.P. No.1004 of 1981 in O.S.No.523 of 1962. When the proceedings were pending in the Court for taking delivery, the contention of the Plaintiffs that they were waiting for the conclusion of the Court proceedings is probable and acceptable. The point of Readiness and Willingness had it been raised in the trial Court, the Plaintiffs would have further elaborated the same by adducing appropriate evidence explaining the defence.

21. The Readiness and Willingness of the Plaintiffs is challenged for the first time in the second appeal. Appellant / D.1 cannot be allowed to set up a new case in the second appeal. Since it is incumbent upon the Court to raise this issue on its own, the second appeal came to be admitted on the above Substantial question of Law. Had the point been raised during the trial proceedings, the Plaintiffs would have adduced more evidence explaining the defence. The objection raised by D.1 that the absence of pleading and proof on the Readiness and Willingness and omission of the Court to frame the issue vitiates the trial cannot be sustained.

22. Exs.A.2 to A.5 are the receipts / letters written by D.1 to the Plaintiffs referring to the details of the litigation and asking for money. The amount of Rs.2,001/- is said to have been paid under Exs.A.2 to A.5. Case of the Plaintiffs that the consideration of Rs.2,001/- was paid towards suit agreement was not accepted by the Courts below. The concurrent finding of the Courts below is to the effect that under Exs.A.2 to A.5, there is no reference connecting Ex.A.1 - Agreement of Sale. Now it is the

contention of D.1 that when the Plaintiffs seeking the relief of Specific Performance put forth a false plea, Plaintiffs would be disentitled to the equitable and justifiable relief of Specific Performance. In this regard, reliance is placed upon A.I.R. 1971 ANDHRA PRADESH 279 - K.Venkatasubbaya v. K. Venkateswarlu. In the said case, the plaintiff had set up a false plea of payment of major portion of the sale consideration and in that view of facts and evidence, it was held that the plaintiff would be disentitled to the discretionary relief on the ground that the plaintiff has set up a false plea. In the present case, the Plaintiffs cannot be faulted as setting up a false plea. In Para (7) of the Plaint, the Plaintiffs have clearly averred the payment of Rs.2,001/- as noted below:-

" ... If for any reason the Court finds that the sum of Rs.2,001/- cannot be deducted out of the sale consideration, the Plaintiffs are prepared to pay the entire amount of Rs.6,000/- and take separate action for recovery of Rs.2,001/- received by the 1st defendant ... "

Therefore, it is not a case where the Plaintiffs are said to have come to the Court putting forth a false plea disentitling them. In appreciation of evidence, the Courts below have rightly exercised the discretion in granting the relief of Specific Performance to the Plaintiffs.

23. The concurrent findings of the Courts below are in proper appreciation of evidence and well balanced. The Supreme Court time and again has pointed out that interference with the concurrent findings of the Courts below by the High Court is to be avoided unless warranting by compelling reasons. No such substantial or compelling reasons are made out warranted interference in the concurrent findings of the Courts below. This second appeal is bereft of merits and is bound to fail.

24. The Judgment of the First Appellate Court / Sub Court, Cuddalore in A.S.No.167 of 1992 dated: 15.09.1993 (arising out of the Judgment of D.M.C., Cuddalore in O.S.No.202 of 1989 dated 11.03.1992) is confirmed and this second appeal is dismissed. In the circumstances of the case, there is no order as to costs.

Index: Yes
Internet: Yes

sbi

To

1. The Sub Judge,
Cuddalore.

2. The District Munsif,
Cuddalore.

3. The Record Keeper,

V.R.Records,
High Court, Madras.